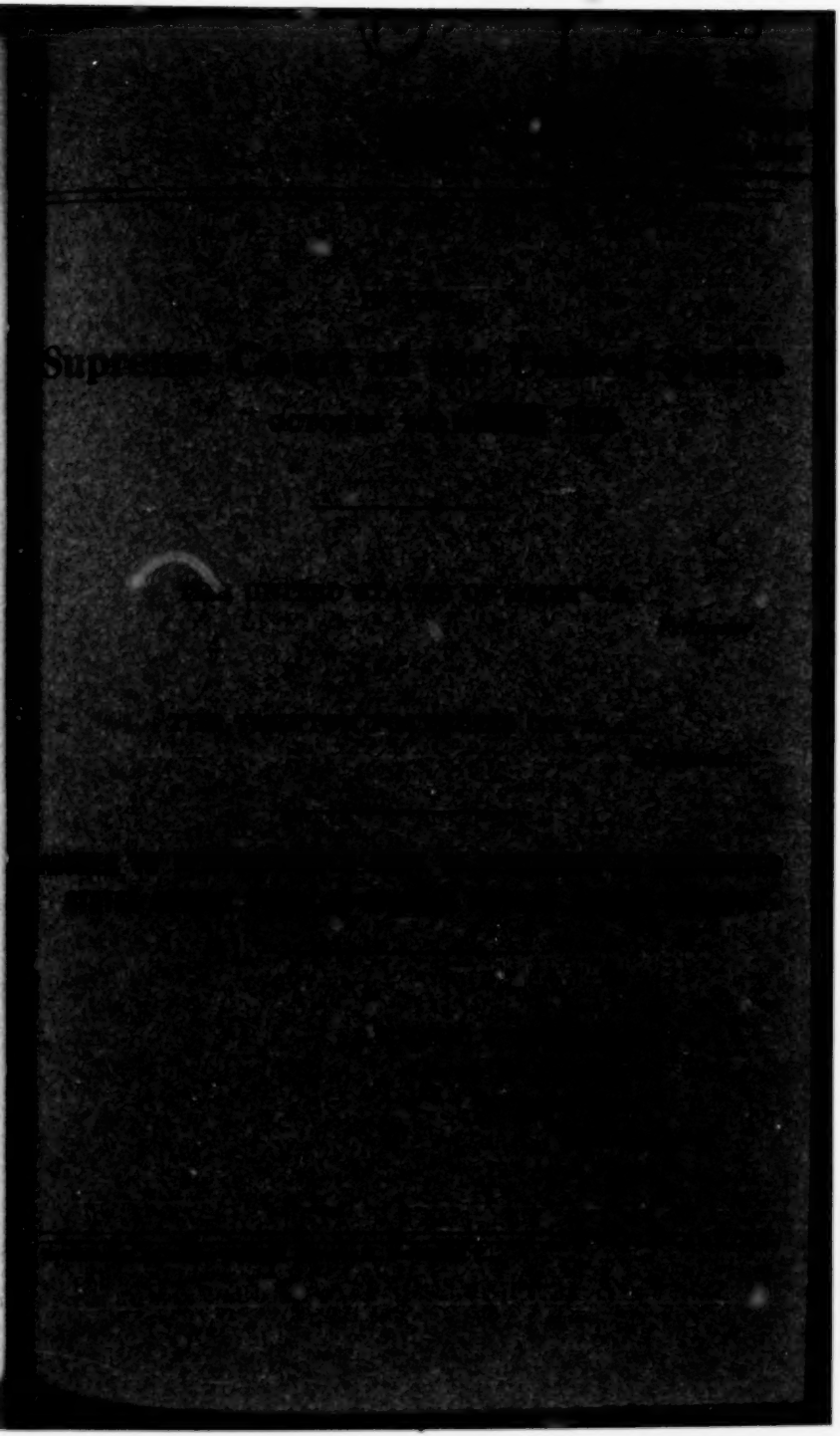

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

THE UNITED STATES OF AMERICA,
Petitioner,
v.
THE TRENTON POTTERIES COMPANY, *et al.*,
Respondents.

No. 591

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

The respondents to the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit appear in response to the notice served upon them by the petitioner and respectfully show that the petition should be dismissed and a writ of certiorari denied for the following reasons:

I.

Because this court has no jurisdiction to grant a writ of certiorari to review a decision of the Circuit Court of Appeals in favor of the defendants in a criminal case.

This was held in *U. S.* v. *Dickinson,* 213 U. S. 92, under the Act of 1891, and the Act of 1911 did not enlarge the power of the court in this respect.

II.

The petition for the writ is inaccurate and misleading.

In *Furness, Withy & Co.* v. *Yang-Tsze Ins. Ass'n* (1916), 242 U. S. 430, this court laid down the rule governing such petitions, saying (p. 434), "Unless these are carefully prepared, contain *appropriate* references to the record and present with *studied accuracy, brevity and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced." (Italics by the court.) The petition fails to do this in the following respects:

(1)

The "statement of the case" in the petition is inaccurate and misleading.

The statement as to what the Circuit Court of Appeals held (Petition, p. 3) is not only incomplete, but inaccurate. It studiously avoids mention of the most important holding of the Circuit Court of Appeals which, as that Court said, "went to the foundation of the prosecution"—that is, the holding that Section One of the Sherman Act means the same thing, however its enforcement may be sought, and that, "The statute cannot mean one thing on the criminal side of the court and another on the civil side" (C. C. A. opinion, p. 6). The petition does not attack the correctness of this proposition.

As a corollary the Circuit Court of Appeals held that as the statute was passed to prevent public in-

jury by prohibiting *undue* and *unreasonable* restraints of trade, the question whether the defendants had been guilty of such a restrain was a question for the jury, and not, as the petition alleges, that criminal liability was dependent upon proof of injury to the public. This does not, as the Government charges, "substitute the composite opinions of twelve jurymen as to what should be the law of the land for a great statute" (Petition, p. 3)—it merely leaves to the jury the question whether the defendants have committed acts which violate the provisions of the statute as this court has interpreted them. See 221 U. S. at page 78.

(2)

The statement in the petition of the questions involved is also inaccurate and misleading.

1. The first and principal question involved is whether the standards of reason announced by this court in the *Standard Oil* and *Tobacco* cases are confined to civil suits and suits in equity, or apply as well to criminal proceedings. This is not mentioned in the petition. The trial court ruled that these standards have no application in a criminal case and could not be considered *either by the jury or by the court* (R. p. 665, fols. 1993-5; p. 666, fols. 1996-7). This the Circuit Court of Appeals held to be error. It also held that it was error to exclude from the jury the question whether the defendants' conduct resulted in the undue and unreasonable restraint prohibited by the statute and to deny defendants' requests that this issue be submitted to the jury. Surely the correctness of this ruling of the Circuit Court of Appeals is involved in the Government's application, yet the petition contains no suggestion with respect to it.

2. The second question referred to in the petition (p. 4) is inaccurately stated. The Government in the indictment alleged the formation of a combination or conspiracy, not in the Southern District of New York, where the indictment was found, but elsewhere; charging, in order to give the court jurisdiction, that the defendants committed certain specified overt acts in that District (R. pp. 9-11, fols 26-32; pp. 13-14, fols. 37-41). The government introduced evidence which it contended showed the formation of such a conspiracy elsewhere than in the Southern District of New York and the commission in that District of the overt acts specified in the indictment. The Government's statement (Petition, p. 4), that the defendants by evidence which they adduced admitted these allegations, is untrue. The petition contains no appropriate reference to the record with respect to this. The Government does not, and cannot, point out any evidence adduced by the defendants which admits such acts. All of the allegations of the Government were denied by the defendants, who put in evidence which they insisted disproved both the formation of the combination or conspiracy and the alleegd overt acts. The trial court submitted to the jury only the question whether there was any combination or conspiracy, not only excluding from their consideration any question as to whether there was any undue or unreasonable restraint of commerce, but also instructing them that "A mere agreement * * * constitutes an offense, and it is immaterial whether anything is done by the combination, its members or its agents toward the carrying out or performance of such agreement. The mere making of the agreement, though nothing is ever done towards its accomplishment is in itself a violation"

(R. p. 694, fols. 2081-2) and further that if they found any combination or conspiracy, the defendants were guilty, *whether it was carried out or not, or whether any effort was made to carry it out* (R. p. 695, fol. 2084; p. 697, fol. 2090; p. 723, fols. 2167-8). The question is not, as stated in the petition, whether the court was required to charge on the subject, but whether the charge delivered by the court correctly stated the law in its instruction to the effect that the commission of overt acts upon which the jurisdiction of the court depended, need not be proved by the Government or found by the jury.

3. The so-called "minor questions" are minor only by comparison with those already discussed.

(*a*) The defendants, to disprove that they had refrained from competition, called a number of their customers to show that they continually engaged in competition, which testimony the trial court excluded on the ground that it was "opinion evidence" (R. p. 339, fol. 1016; p. 344, fols. 1031-2; p. 394, fol. 1182; p. 398, fols. 1191-2; pp. 434-6, fols. 1301-7; p. 441, fol. 1323; p. 465, fol. 1395; p. 469, fol. 1406; p. 466, fol. 1397; pp. 511-512, fols. 1533-5; pp. 375-6, fols. 1123-6; p. 474, fol. 1420; pp. 466-7, fols. 1398-1401; p. 525, fol. 1575; p. 497, fol. 1491; p. 491, fols. 1471-2). The propriety of such evidence was unquestioned in the *Steel* case, where over two hundred witnesses gave testimony of just the character here excluded, which was most important in the decision of the case. (*United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 448.)

(*b*) At the trial the Government did not "inquire into the possible bias" of Mr. Bantje, but was allowed to show that he was employed by a corpora-

tion affiliated with another corporation which had pleaded guilty to a violation of the Sherman Act (R. pp. 453-6), and this upon the express ground that it affected the credibility of the witness (R. p. 454, fol. 1360, p. 456, fols. 1367-8). The Government was also allowed to show that a Mr. Hanley, with whom the Secretary of the Sanitary Potters Association had corresponded, had been examined by the Lockwood Committee, a local legislative investigating committee whose activities were the subject of much discussion in the District, for the purpose of showing why the defendants were not engaged in certain alleged activities which the defendants had disproved, and this although it did not appear that any defendant had ever heard of such examination or that it had any relation to the matters covered by the indictment (R. pp. 189-193, fols. 566-578). The Circuit Court of Appeals held that these rulings were error, and although it refers to them as minor questions, it regarded them of sufficient importance to comment upon them as "a favorite and very modern form of verbal assault", which has no place in a criminal trial (C. C. A. opinion, p. 9). The propriety of this characterization is apparent.

(3)

The statement of "The Facts" in the petition is merely a statement of the Government's interpretation of its own evidence.

The statement in the petition merely summarizes the Government's evidence. It omits to state that every fact there referred to was denied by defendants, who introduced evidence in support of their denial. As a statement of the Government's contentions it is unexceptionable. To call it a statement of facts is misleading.

(4)

The Government's "Reasons for granting the petition" are insufficient.

The Circuit Court of Appeals did not hold that it was for the jury to decide whether "such an agreement" as is outlined in the Government's so-called statement of facts constituted an undue or unreasonable restraint of trade. What it did hold was, first, that the trial court's ruling that whether a combination or conspiracy was an undue or unreasonable restraint could not be considered, either by the jury or by the court, was error; and, second, that it was for the jury to determine whether the defendants were guilty of such acts as would constitute the undue and unreasonable restraint prohibited by the statute. The question of reasonableness is not essentially legal, but has been held to be a question of fact. (*United States* v. *U. S. Steel Corporation,* 223 Fed. 55, 61, 78; affd. 251 U. S. 417.) Under the clear statement of the law by this court in the *Standard Oil* and *Tobacco* cases, it cannot properly be called an immaterial element. It is no more speculative in a criminal prosecution than in a suit in equity, where the Government admits it must be considered. That the Government finds it difficult of proof is no ground for extraordinary relief. Such difficulty is not uncommon; in fact it is a difficulty with which the Government has been compelled to deal in a number of cases since the decisions in the *Standard Oil* and *Tobacco* cases were announced. See *United States* v. *Keystone Watch Case Co.* (D. C. E. D. Pa. 1915), 218 Fed. 502, 507, 516; *United States* v. *Whiting* (D. C. Mass., 1914), 212 Fed. 466, 475; *United States* v. *Cement Mfr'rs. Pro-*

tective Ass'n. (D. C. S. D. N. Y., 1923), 294 Fed. 390, 400; *United States* v. *St. Louis Terminal Ass'n.*, 224 U. S. 383, 394; *Nash* v. *United States*, 229 U. S. 373, 376; *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *American Column Co.* v. *United States*, 257 U. S. 377, 399-400; *Window Glass Mfr'rs* v. *United States*, 263 U. S. 403, 413. It is certainly no ground for denying defendants their constitutional right to have the question of their guilt or innocence tried by a jury.

III.

Because of other errors committed by the District Court not specifically referred to in the opinion of the Circuit Court of Appeals.

(1) The District Court erroneously denied respondents' requests for charges to the jury embodying relevant propositions of law announced by this Court in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Nash* v. *United States*, 229 U. S. 373, and other cases. (Respondents' requests Nos. 22-31, R. pp. 673-675, fols. 2016-2025; p. 727, fols. 2180-1). The twenty-fifth request (R. pp. 673-4, fols. 2019-2020) is in the very language of this court in *Chicago Board of Trade* v. *United States*, 246 U. S. 231.

(2) The District Court submitted the second count to the jury with the erroneous construction that it alleged an agreement to confine sales to a "class" instead of to a special group, and denied

respondents' requests to charge Nos. 54-59 (R. pp. 683-4, fols. 2048-2052; p. 728, fol. 2183) and erroneously charged that the law prohibits an agreement to confine sales to a class (R. p. 703, fol. 2108).

IV.

If this court finds that the judgment of the Circuit Court of Appeals was correct such judgment should be affirmed without regard to the reasons given by that Court for its judgment.

The office of a writ of certiorari is to bring up for review the correctness of the judgment of the court below, and not of the reasons given by that court for its judgment. This court will not consider any question where its decision with respect thereto cannot result in the reversal of the judgment below. *United States* v. *Evans,* 213 U. S. 297. As this court said in *Binney's Lessee* v. *The Chesapeake & Ohio Canal Co.,* 8 Peters, 214, 219:

> "Where error exists in the proceedings of the Circuit Court, which will justify a reversal of its judgment, this court may send back the cause, with such instructions as the justice of the case may require. But if, in point of law, the judgment ought to be affirmed, it is the duty of this court to affirm it. 6 Cranch. 268; 2 Cond. Rep. 367. We cannot, with propriety reverse a decision which conforms to the law, and remand a cause for further proceedings."

The Government does not question the correctness of the ruling of the Circuit Court of Appeals that the meaning of the Sherman Act is the same whatever the nature of the proceeding in which it may be considered and that it cannot have a mean-

ing on the criminal side of the court which differs from its meaning on the civil side. Nor does the Government contend that in a case where the jurisdiction of the District Court depends upon the commission of overt acts within the district, a conviction can be had without a finding by the jury that such overt acts have been committed. Entirely apart, therefore, from any other considerations, the judgment of the District Court was erroneous on these points and the judgment of the Circuit Court of Appeals reversing it and remanding the case for a new trial was correct.

RICHARD V. LINDABURY,
Attorney for Respondents.

Dated September 30, 1924.

NOTE: The notice served with a copy of the petition upon counsel for the Respondents on August 19, 1924, contains the statement that "Brief in support of the petition will be served upon you later." Rule 37 of this Court requires that Petitioner's brief, if any is to be filed, shall be served upon Respondents two weeks before the day fixed for the presentation of the petition. Under Section 4 of Rule 37 the petition must be submitted on October 6, 1924, the first motion day after the expiration of four weeks after it was filed, and notice was accordingly given for that day. Petitioner's time to serve its brief, therefore, expired on September 22, 1924. As no brief has yet been served, it is assumed that none is to be filed, and that if Petitioner files any brief which has not been duly served upon Respondents, and to which they have therefore been unable to reply, the court will decline to consider it.